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2:17-cv-01766-JAD-GWF

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## Order Granting in Part Motion to Dismiss

[ECF No. 12]

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1 backpack off a product shelf and place it in a shopping cart. He then selected some Icy Hot electric  
2 relief pads and two boxes of hair dye and placed them in the shopping cart before stashing all but  
3 one box of hair dye in the backpack, which he then slung onto his back. He went to the cashier,  
4 paid for the one box of hair dye in his hand, and then exited the store through the outdoor-living  
5 entrance with the backpack and its concealed items still on his back.<sup>8</sup> Schachter was caught, and the  
6 purloined items were recovered.<sup>9</sup> After completing his investigation, the investigating officer left  
7 the backpack and its contents with the store, which restocked them for sale.<sup>10</sup>

8 On direct appeal, Schachter, through counsel, argued that “[t]he District Court erred in  
9 finding that the State’s failure to collect the allegedly stolen backpack was the result of mere  
10 negligence.”<sup>11</sup> He thus presented only one argument on appeal about the materiality of the  
11 unpreserved evidence: he argued that “the backpack itself would prove the backpack was  
12 customized and as a result it could not have been stolen on the day in question.”<sup>12</sup> The Supreme  
13 Court of Nevada rejected this claim because the backpack was not material. It explained that  
14 “attempted robbery does not include a threshold monetary valuation and the amount stolen does not  
15 affect the sentence,” and Schachter did “not allege that he did not steal the other items found in the  
16 backpack,” and Monroy “testified that he witnessed Schachter put the other items in the  
17 backpack.”<sup>13</sup> So, a showing that the backpack itself was not stolen “would not have changed the  
18 outcome of the proceedings because, whether the backpack was his or not, it still contained items  
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21 <sup>8</sup> See ECF No. 14-8, at 33–43 & 50–59; Exhibit 44, at 32–42 & 49–58.

22 <sup>9</sup> ECF No. 14-8 at 94–95.

23 <sup>10</sup> *Id.* at 78–79; Exhibit 44, at 77–78. ECF No. 14-10, at 44 & 86–87; Exhibit 46, at 43 & 85–86.  
24 The officer testified that this was standard practice given the number of store thefts.

25 <sup>11</sup> ECF No. 15-15, at 19; Exhibit 85A, at 18; *see also id.*, at 14; Exhibit 85A, at 13.

26 <sup>12</sup> ECF No. 15-24, at 5–6; Exhibit 92A, at 4–5; *see also* ECF No. 15-15, at 21 n.11; Exhibit 85A, at  
27 20 n.11.

28 <sup>13</sup> ECF No. 15-28, at 4; Exhibit 96, at 3.

1 [Schachter] stole.”<sup>14</sup>

2 Federal Ground 2 goes beyond the backpack. Schachter alleges that he was denied due  
3 process of law in violation of his Fifth, Sixth, and Fourteenth Amendment rights when the  
4 investigating officer did not take custody of the allegedly stolen property. He also incorporates his  
5 allegations in Ground 3 in which he urges that the state supreme court incorrectly stated that he did  
6 not allege that the other items in the backpack were his. And he adds that the Court’s finding that  
7 the evidence was not material is contrary to federal law “because the condition of the actual  
8 backpack along with the lost video and the loss of preliminary hearing transcripts prevented [him]  
9 from impeaching the witness effectively.”<sup>15</sup>

10 To the extent that Schachter seeks to base ground 2 on a failure to preserve evidence other  
11 than the backpack, it is unexhausted. Different factual allegations render a claim unexhausted if the  
12 allegations fundamentally alter the legal claim considered by the state court or the allegations place  
13 the case in a significantly different and stronger evidentiary posture than when the state courts  
14 considered the claim.<sup>16</sup> Schachter’s attempt to base this claim on a failure to preserve the  
15 surveillance video and preliminary-hearing transcript both fundamentally alters the claim presented  
16 to the state supreme court and seeks to place the claim on a significantly different and stronger  
17 evidentiary posture than when that court considered the claim.<sup>17</sup>

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19 <sup>14</sup> *Id.*, at 5; Exhibit 96, at 4.

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21 <sup>15</sup> ECF No. 5, at 10. The reference to lost video footage is to surveillance video that was not  
22 preserved over and above the surveillance footage that was copied for preservation and introduced  
23 at trial. Due to a technical issue, the preliminary hearing could not be transcribed. *See* ECF No. 13-  
24 3, at 3; Exhibit 3, at 2.

25 <sup>16</sup> *See generally Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (*en banc*).

26 <sup>17</sup> I do not read respondents’ motion to argue that ground 2 is rendered unexhausted simply because  
27 Schachter argues that the state supreme court made an unreasonable determination of fact when it  
28 stated that he did not allege that the other items in the backpack were his. The sole materiality  
argument presented to the state supreme court on appeal, however, concerned only the backpack  
itself. In this regard, the outcome on the exhaustion issue turns upon the factual basis for the claim

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1 **C. Ground 4 is entirely unexhausted**

2 On March 5, 2015, the state district court entered a judgment of conviction sentencing  
3 Schachter to a term of 12–48 months for attempted robbery under count I in the amended  
4 information and separately to a concurrent term of 5–20 years as a habitual criminal under count  
5 III.<sup>22</sup> On direct appeal, Schachter argued that the district court erred under Nevada state law by  
6 imposing separate sentences for both the underlying substantive offense and the habitual-criminal  
7 adjudication rather than simply a single sentence.<sup>23</sup> The State agreed,<sup>24</sup> and on July 30, 2015, prior  
8 to the resolution of the appeal, the district court entered a corrected judgment of conviction that  
9 sentenced Schachter as a habitual criminal on the attempted-robbery count to 5–20 years.<sup>25</sup>  
10 Schachter subsequently acknowledged that no further issue remained, and the state supreme court  
11 concluded that the issue was moot when it addressed the other issues in his appeal.<sup>26</sup>

12 In ground 4 of his federal petition, Schachter alleges that by allegedly “allowing” the state  
13 district court to enter a corrected judgment, “the Nevada Supreme Court allowed the trial court to  
14 resentence [him] after [he] had finished the original 12–48 month sentence” and that “[t]his clearly  
15 violates [his] 5<sup>th</sup> Amendment right against double-punishment.” He further alleges that “the Nevada  
16 Supreme Court also prevented [his] right to be present and make objections at [his] sentencing.”<sup>27</sup>

17 Ground 4 is unexhausted. Schachter acknowledged in his petition that these federal claims  
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20 <sup>21</sup>(...continued)

21 contradict Monroy’s testimony, which would call his credibility into question. *See* ECF No. 15-24,  
22 at 5–6; Exhibit 92A, at 4–5. So that portion of this claim appears to be exhausted.

23 <sup>22</sup> ECF No. 15-5; Exhibit 76.

24 <sup>23</sup> ECF No. 15-15, at 14–15; Exhibit 85A, at 13–14.

25 <sup>24</sup> ECF No. 15-18, at 4–5; Exhibit 87A, at 3–4.

26 <sup>25</sup> ECF No. 15-21; Exhibit 90.

27 <sup>26</sup> ECF No. 15-24, at 1; Exhibit 92A, at 2. ECF No. 15-28, at 2–3 n.1; Exhibit 96, at 1–2 n.1.

28 <sup>27</sup> ECF No. 5, at 16–17.

1 were not presented on direct appeal. He urged, however, that the state supreme court's alleged  
2 remedy caused the violation and that he was "unable to properly appeal a favorable ruling that  
3 contains an unconstitutional remedy in a timely fashion."<sup>28</sup> But Schachter did have avenues to raise  
4 the federal claims in ground 4 in the state court. First, he simply could have filed a timely appeal  
5 from the corrected judgment. Second, to the extent that he believed that the state supreme court  
6 itself erred in "providing" a remedy on the original direct appeal, he could have filed a petition for  
7 rehearing in that court.<sup>29</sup> Schachter's reliance on alleged "common sense" in his opposition to the  
8 motion to dismiss is even less persuasive. The federal claims in ground 4 never were presented to  
9 the state supreme court and are unexhausted in their entirety.<sup>30</sup>

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12 <sup>28</sup> ECF No. 5, at 17-18.

13 <sup>29</sup> The existing federal record does not necessarily reflect either that the Nevada Supreme Court  
14 acted to "allow" the state district court to enter a corrected judgment or itself provided any remedy  
15 in this regard. The record reflects only that the state district court unilaterally corrected the  
16 judgment and that the state supreme court thereafter found the purely state-law issue raised on  
appeal to be moot.

17 <sup>30</sup> Schachter has not argued that any of his unexhausted claims are technically exhausted by  
18 procedural default. He presents only substantive claims with no claims of ineffective assistance of  
19 trial counsel. On substantive claims, the Nevada state courts recognize substantially the same  
20 grounds for overcoming a procedural default as the federal courts do: to establish technical  
21 exhaustion by procedural default, Schachter would have to unequivocally stipulate that he cannot  
22 establish cause and prejudice, cannot establish actual innocence, and cannot otherwise overcome  
23 state procedural bars if he were to raise the unexhausted claims in a state post-conviction petition.  
Such an unequivocal stipulation would establish technical exhaustion but also result in the claims  
being dismissed with prejudice as procedurally defaulted. *See generally Rodriguez v. Filson*, 2017  
24 WL 6762466, at \*4-6 (D. Nev., Dec. 29, 2017); *Myers v. Filson*, 2017 WL 5559954, at \*2-4 (D.  
Nev., Nov. 17, 2017).

25 Schachter's argument that respondents defaulted by not responding to ground 1 is meritless.  
26 The scheduling order directed respondents to "answer or otherwise respond to the petition" and to  
27 raise all potential affirmative defenses in the initial response. ECF No. 4, at 2. A motion to dismiss  
28 that raises the procedural defenses applicable to selected claims complies with the scheduling order,  
so respondents are not in default. Even if they were, a judgment by default is not available in a  
habeas proceeding. *See, e.g., Gordon v. Duran*, 895 F.2d 610, 612 (1990).

1 **D. Because his petition contains a mix of exhausted and unexhausted claims, Schachter**  
2 **has until October 19, 2018, to choose one of three ways to proceed from here.**

3 A federal court may not entertain a habeas petition unless the petitioner has exhausted  
4 available and adequate state court remedies for **all** claims in the petition.<sup>31</sup> A “mixed” petition—one  
5 that contains both exhausted and unexhausted claims—is subject to dismissal.<sup>32</sup> Because  
6 Schachter’s petition contains a mix of exhausted and unexhausted claims, he must now choose one  
7 of three paths forward. **Schachter has until October 19, 2018, to either (1) submit a sworn**  
8 **declaration voluntarily abandoning the unexhausted claims in his federal habeas petition, and**  
9 **proceed only on the exhausted claims; (2) return to state court to exhaust his unexhausted**  
10 **claims, in which case his federal habeas petition will be denied and dismissed without**  
11 **prejudice; or (3) file a motion asking this court to stay and abey his exhausted federal habeas**  
12 **claims while he returns to state court to exhaust his unexhausted claims.**

13 If Schachter does not select one of these three options or seek and obtain other appropriate  
14 relief from this court by the deadline, the court will dismiss this entire federal habeas petition  
15 without prejudice. If he chooses the second option, he is cautioned that deadlines and statutes of  
16 limitation may have run, and that his claims may be time-barred if they are dismissed and he later  
17 returns to pursue them.<sup>33</sup> If he chooses the third option, he is cautioned that a stay is available only  
18 if he can show good cause for his failure to exhaust his claims in state court:

19 [S]tay and abeyance should be available only in limited  
20 circumstances. Because granting a stay effectively  
21 excuses a petitioner’s failure to present his claims first  
22 to the state courts, stay and abeyance is only  
23 appropriate when the district court determines there  
24 was good cause for the petitioner’s failure to exhaust  
25 his claims first in state court. Moreover, even if a

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24 <sup>31</sup> *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

25 <sup>32</sup> *Id.*

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27 <sup>33</sup> Connors should familiarize himself with the limitations periods for filing federal habeas petitions  
28 contained in 28 U.S.C. § 2244(d), as those limitations periods may have a direct and substantial  
effect on whatever choice he makes regarding his petition.




1 petitioner had good cause for that failure, the district  
2 court would abuse its discretion if it were to grant him  
3 a stay when his unexhausted claims are plainly  
meritless.<sup>34</sup>

### Conclusion

4 Accordingly, IT IS HEREBY ORDERED that respondents' motion to dismiss [ECF No.  
5 12] is **GRANTED IN PART** and **DENIED IN PART**, and I hold that the following claims are  
6 unexhausted: (a) Ground 2 to the extent that Schachter bases the claim on a failure to preserve any  
7 evidence other than the backpack; (b) Ground 3 to the extent that Schachter alleges that the state  
8 supreme court's statement unfairly shifted the burden of proof to the defendant and that a valid  
9 conviction could not be obtained because there was no way to determine whether the jury's verdict  
10 was based solely on the backpack rather than the other items; and (c) Ground 4 in its entirety.

11 IT FURTHER IS ORDERED that Schachter has **until October 19, 2018**, to dispatch to the  
12 Clerk a filing that elects one of the three options outlined on page 8 of this order. **If Schachter fails**  
13 **to make an election by this deadline, this action will be dismissed in its entirety without**  
14 **prejudice.** Respondents may file a response to any motion filed by Schachter in response to this  
15 order, including a motion to stay, within the time provided by the local rules. No further response to  
16 the petition is required at this time.

17 DATED: September 19, 2018

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U.S. District Judge Jennifer A. Dorsey

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<sup>34</sup> *Rhines v. Weber*, 544 U.S. 269, 277 (2005).